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Nos. 78-857 and 78-997

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

YESHIVA UNIVERSITY

YESHIVA UNIVERSITY FACULTY ASSOCIATION, PETITIONER

v.

YESHIVA UNIVERSITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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I.

The University contends that faculty members perform functions that are "analogues of functions

performed by people who are 'managers' and 'supervisors' * * * in other work contexts," and that the Board has "avoided this logical conclusion" by arbitrarily adopting a special rule in the academic context: that "faculty members are employees because they are professionals who act in their own interests, collectively, and without 'final authority' " (Resp. Br. 33). There is no merit to this line of argument.

A. The definition of "supervisor" in Section 2(11) of the Act requires not only that an individual possess one or more of the enumerated powers, but that such powers be exercised "in the interest of the employer." [1] Similarly, the definition of "managerial em-

[1] See, e.g., *International Union of United Brewery Workers* v. *NLRB*, 298 F.2d 297, 304 (D.C. Cir. 1961), cert. denied, 369 U.S. 843 (1962), concluding that driver-salesmen were not supervisors even though they possessed authority to hire and oversee certain helpers because they exercised their authority in their own interest and not on behalf of the company. The court explained that "[i]n no meaningful sense was their exercise of authority 'in the interest of the employer.' On the contrary, * * * the driver-salesmen were motivated by and were acting in their own interest. Engaging the helpers had the effect of reducing the manual burdens of the driver-salesmen, expediting the service to their route customers, and increasing their potential for higher commissions * * *." See also *NLRB* v. *Master Stevedores Association of Texas*, 418 F.2d 140, 141-143 (5th Cir. 1969), holding that certain employees authorized to hire longshoremen for particular jobs were not supervisors because they did not act as the employer's representatives: "[t]hey were nominated in the first instance by the union from the union membership to fulfill the union's obligation under its contract with the stevedores. There is no showing of any identity of interest between these men and the employers." *Id.* at 143.

ployee," approved by this Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 286-287 (1974), requires not only that an individual be in a position to determine or effectuate management policies, but also that he or she be aligned with and act as a representative of management.[2]

The basic premise of both the supervisory and managerial exclusions is management's right to have its

[2] Contrary to the brief amici curiae of Johns Hopkins University, New York University, Northeastern University, and George Washington University (hereinafter "Johns Hopkins Br."), this Court did not reject the Board's alignment with management test in *Bell Aerospace*. Rather, the Court rejected an interpretation of the managerial exclusion that would have limited it to persons engaged in labor relations activities. The Court concluded that legislative history and prior Board precedent established that persons other than labor relations personnel could have managerial status if closely allied with management. See also *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 412 F.2d 324, 326 (8th Cir. 1969) (the managerial exclusion rests "on the premise that certain non-supervisory employees are * * * closely allied with management," not on the labor relations function); *Wichita Eagle & Beacon Publishing Co.* v. *NLRB*, 480 F.2d 52, 55-56 (10th Cir. 1973), cert. denied, 416 U.S. 482 (1974) (editorial writers held to be managerial employees because "they were so closely aligned with the newspaper's management in the formulation, determination, and effectuation, not to mention expression, of the newspaper management's policies * * *.")

The brief amicus curiae of the National Society of Professional Engineers (hereinafter, "NSPE Br.") errs in stating that the Court concluded that the buyers in *Bell Aerospace* were managerial employees. The Court remanded the case to the Board for determination of that very question. See 416 U.S. at 295. On remand, the Board found that they did not have managerial status. See 219 N.L.R.B. 384, 385-386 (1975). See also note 3, *infra*.

representatives accountable solely to it and not to have their loyalty divided with a union. When an individual, though acting on matters of importance to management, does not function in a capacity in which he is expected to conform to management policies and is not judged according to his or her effectiveness in executing those policies (which is the case with many "professional employees"), the danger of divided loyalty does not exist. There is therefore no reason to exclude such individuals from the protections of the Act; indeed, to do so would be contrary to Congress' specific intention to extend statutory coverage to a broad spectrum of "professional employees" (including medical personnel, lawyers, accountants, engineers, scientists, and architects) who exercise independent judgment rather than executing managerial policies. See the Board's principal brief (hereinafter, "Board Br.") at 24-33, 45-48.

B. The Board has applied this principle consistently in determining supervisory or managerial status under the Act. As the Board explained in *General Dynamics Corp.*, 213 N.L.R.B. 851, 857-858 (1974), "managerial status * * * is reserved for those who are closely aligned with management as true representatives of management"; the Board added that "managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction." See also *Bell Aerospace, A Division of Textron, Inc.*,

219 N.L.R.B. 384, 385-386 (1975); *Western Sample Book and Printing Co.*, 209 N.L.R.B. 384, 385 (1974) (finding no supervisory or managerial status since the employee was not "closely allied with management or * * * intimately involved in effectuating [the employer's] policies, but was at most a senior experienced employee"); *Electric Wiring, Inc.*, 193 N.L.R.B. 1059, 1062-1063 (1971) (holding that an employee did not have managerial status even though he did some work with managerial characteristics, since the rest of his time was spent working "in the same way and under the same conditions as [the employer's] other employees. This slight distinction is not sufficient * * * to identify his interest with th[at] of * * * management"); see also *Consolidated Papers, Inc.*, 179 N.L.R.B. 165, 166 (1969), and the cases cited in Board Br. 27.

The cases cited by the University (Resp. Br. 34-35) are not to the contrary. For example, in *Sutter Community Hospitals of Sacramento*, 227 N.L.R.B. 181, 193 (1976), which held that a clinical specialist was a managerial employee, the Board noted that in exercising her discretion the specialist acted in the interest of management. The Board also emphasized that:

> managerial status is conferred only upon those in executive-type positions whose interests are closely aligned with management as true representatives of management. Accordingly, we have held that professional employees are not the same as management employees merely because their professional competence necessarily in-

> volves a consistent exercise of discretion and judgment in a manner which may affect an employer's business direction or establish policy.

Similarly, in *Peter Kiewit Sons' Co.*, 106 N.L.R.B. 194, 196 (1953), the excluded personnel, who planned and executed indoctrination programs for both supervisors and employees, were deemed to be managerial because they were closely "allied with management." [3]

C. The Board's conclusion that the faculty members here involved are not managerial or supervisory employees rests on the same principle.[4] While the

[3] The University correctly notes that the Board has found personnel such as buyers, expediters, investigators, production schedulers and lecturers to be managerial employees, citing *Spicer Mfg. Corp.*, 55 N.L.R.B. 1491, 1498 (1944); *American Locomotive Co.*, 92 N.L.R.B. 115, 116-117 (1950); *Electric Controller & Mfg. Co.*, 69 N.L.R.B 1242, 1246 (1946); *Westinghouse Electric Co.*, 100 N.L.R.B. 420, 423 (1952); *Firestone Tire and Rubber Co.*, 112 N.L.R.B. 571, 573 (1955); and *Peter Kiewit Sons' Co.*, 106 N.L.R.B. 194, 196 (1953). However, when they have not been shown to be closely aligned with management, the Board has concluded that such personnel are not managerial employees. See, *e.g.*, *Bell Aerospace, A Division of Textron, Inc.*, 219 N.L.R.B. 384, 385-386 (1975), on remand from 416 U.S. 267 (1974) (buyers); *Lockheed-California Co.*, 217 N.L.R.B. 573, 574-575 (1975) (buyers); *Dynalectron Corp.*, 231 N.L.R.B. 1147, 1149 (1977) (buyers and expediters); *Monarch Rubber Co.*, 129 N.L.R.B. 482, 486 (1960) (expediters); *Dow Jones & Co.*, 142 N.L.R.B. 421, 427 (1963) (personnel interviewers); *National Cash Register Co.*, 95 N.L.R.B. 27, 32 (1951) (instructors).

[4] Contrary to the contention of the University (Resp. Br. 50), the Board's "interest/alignment" analysis was not a mere "thought * * * added to the *C.W. Post* rationale" three years after that April 1971 decision (189 N.L.R.B. 904). In February 1972, the Board issued its decision in *Adelphi University*, 195 N.L.R.B. 639, 648, in which it discussed in detail its approach to this issue, explaining that faculty members who participate in university governance "are not advised to advocate management's interests in making their decisions, nor are they advised that they are management's representatives in making them." The "interest/alignment" analysis has been central to the Board's approach in faculty cases following *Adelphi University*. See Board Br. 40-41.

University's faculty members, like those at most other private universities and colleges, participate in decision-making regarding faculty promotion and hiring, curriculum, and other matters of academic policy, they are not required to, and do not, serve as "representatives of management" in so doing.[5] As

[5] When faculty members actually serve as representatives of management, the Board consistently has concluded that they are managerial or supervisory personnel. Thus in *University of Vermont*, 223 N.L.R.B. 423, 426 (1976), the Board excluded department chairmen as supervisors, observing that "[t]heir performance is evaluated by the dean, based primarily upon their administrative performance [and] many of them have risen to higher administrative positions in the University * * *. In some cases they may do little or no teaching [because they] spend considerable time participating in numerous administrative meetings in their respective colleges and with higher authorities." See also *University of Miami*, 213 N.L.R.B. 634, 637 (1974); *Syracuse University*, 204 N.L.R.B. 641, 642 (1973). In contrast, the Board found that the department chairmen in the present case were not supervisors or managers because, although they possess responsibility for faculty hiring, promotion, and tenure, they "act primarily as instruments of the faculty in these matters" (Pet. App. 74a). Accord, *Northeastern University*, 218 N.L.R.B. 247, 252 (1975); *Trustees of Boston University* v. *NLRB*, 575 F.2d 301, 306 (1st Cir. 1978), petition for cert. pending, No. 78-67 (department chairmen are not supervisors because they act " 'in the interest' of the faculty, not of the employer"); *University of Detroit*, 193 N.L.R.B. 566, 568

acknowledged by the University, faculty recommendations embody a "clearly 'independent judgment'" on what is professionally desirable (Resp. Br. 41). Accordingly, faculty members are evaluated by the University on the basis of the quality of their teaching and research and the extent of their participation in university affairs, not on the compatibility with administrative policy of their recommendations or advice.[6] An over-arching administration reviews faculty proposals and renders its final decision on the basis of university-wide considerations and institutional policies. While the ongoing process of discussion between the vice-presidents and

(1971) (department chairmen are not supervisors because they "represent[] the faculty at university senate meetings"). Compare *New York University*, 205 N.L.R.B. 4, 9 (1973), with *New York University*, 221 N.L.R.B. 1148, 1149 (1975) (modifying original decision on the supervisory status of department chairmen in light of new evidence).

[6] The University misapprehends the point of the Board's conclusion that the faculty acts in its own interest rather than the interest of the university administration. The issue is not, as the University suggests (Resp. Br. 51), whether the faculty acts on personal as opposed to altruistic grounds. The relevant consideration is that faculty members—unlike other personnel who have been found to be managerial employees or supervisors in the past (see notes 1 & 3, *supra*)—do not function in a capacity in which they are required to conform to management policies in rendering their decisions and offering advice. The essential purpose of the supervisory and managerial exclusions—protection of the employer's legitimate expectation of undivided loyalty from its representatives—would not be served by excluding from the coverage of the Act those persons who concededly are entitled to exercise wholly independent professional judgment.

the deans usually enables them to avoid situations in which the administration must "veto" faculty proposals, the vice-presidents do have the power, and have exercised it, to overrule proposals that conflict with institutional requirements. See Board Br. 6-17.

The University argues that it is "ludicrous to speak of the faculty versus the 'management' of a great university" (Resp. Br. 39)—that "'the faculty is the school'" (Resp. Br. 35 n.17). However, this line of argument—suggestive of an idealized conception of a university based on a medieval model—ignores the administrative hierarchy within the University and considers the faculty member's role only in relation to his own peer group and individual school. It fails to take account of the essential role of the administrators, such as the Vice-President for Academic Affairs, the Vice-President for Business Affairs, and the President, who are responsible for governing the University as a whole. Nor are the differing interests of the faculty and the administration obliterated by the fact that "the Yeshiva faculty's judgments are almost always accepted by the administrators with whom they share the University's governance" (Resp. Br. 52-53). As pointed out on pages 50-51 of our main brief, agreement between the administration and the faculty is the product of a continuous process of discussion, informal negotiation, and compromise.[7] The persuasive-

[7] As noted in N. Demerath, R. Stephens & R. Taylor, *Power, Presidents, and Professors* 25, 30 (1967), it is frequently necessary for the faculty to assert its own interests in the face of the opposing objectives of the university administra-

ness of the faculty and the respect of the administration for the views of this essential portion of the University's personnel do not logically compel an inference by the Board that the faculty has acted as management's representative in formulating their views.

The University is on no firmer ground in maintaining that the record shows that faculty members are judged by the administration based on the content of their recommendations (Resp. Br. 39). The evidence cited by the University shows only that, at the Stern and Ferkauf schools, one factor relevant to promotion is the professor's record of activity and service in the university (A. 231, 238, 1448); nothing suggests, however, that the direction or thrust, as opposed to the professional competence, of a professor's recommendations or decisions has any impact whatsoever on his or her promotion or compensation. Indeed, the Ferkauf Guidelines for promotion identify the quality of teaching, research and publications as the primary criteria for promotion (A. 1447-1448). Other portions of the record cited by the University show that on occasion certain

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tion. Faculty participation in university governance is participation "in behalf of their constituencies, * * * to modify, tame, and curb the powers of the full-time administrators which derive from the corporate authority of the institution, as interpreted by [the] board [of trustees] and president. * * * [P]rofessors * * * have felt the need for a policy voice in order to protect freedom of inquiry and teaching, and the recognition of professional competence, and they have insisted on having such a voice."

faculty recommendations have been accepted by the administration over conflicting recommendations from the dean (A. 191, 266-269, 379-380); that the deans in several schools generally accept and sometimes feel bound by faculty recommendations concerning tenure, hiring and curriculum (A. 231-232, 248-249, 274, 328); and that administrators ranking higher than the deans sometimes solicit faculty recommendations on tenure and renewal of appointments (A. 419, 537-538). The record does indeed show that the administration is often willing to follow the recommendations of the faculty in deference to its professional judgment and expertise (as would ordinarily be expected of most employers of professional employees). The record nowhere suggests that the faculty is in any way accountable to the administration for the substance of its recommendations.

The Statement of Principles of the Ferkauf Faculty Government By-Laws (A. 1427-1428) underscores the accuracy of the Board's finding that there is a university management separate and distinct from the faculty.[8] While noting that "[p]articipa-

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[8] In this connection, the University misconstrues (Resp. Br. 46) the references in the Board's opinion to the collective nature of faculty participation in the governance system. The Board's point (see Board Br. 40-41 n.35) is not that the collective exercise of authority necessarily precludes a finding of supervisory or managerial status. Rather, the faculty's collegial voice fortifies the inference that its recommendations embody the views of the rank and file, not the views of the administrative chain of command. In observing that authority is exercised by the entire faculty body, rather than by an in-

tion in college government by the faculty cultivates a sense of responsibility and nourishes the combination of thought, feeling, and action without which the college enterprise cannot be fulfilled as it should" and that "participation in the governance of an institution of higher learning is a necessary responsibility of the academic profession," the Preamble at the outset declares (A. 1427):

> Since the Board of Regents of the New York State Education Department has granted the charter to the University's Board of Trustees and the President, full responsibility for decisions relating to the University and its constitutent parts resides with the Board of Trustees and the President. Where specific powers and responsibilities have been delegated to the Dean of the Ferkauf Graduate School, he as the chief educational officer of the school, is administratively responsible for the programs of the school.

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dividual or a relatively small group of persons charged with overseeing a broader body of employees, the Board's decision underscores the common-sense differences between the University's faculty and persons traditionally deemed to be supervisors or managers.

Similarly, the Board has not held, and we do not suggest, that the fact that ultimate authority rests with a board of trustees is dispositive of the faculty's employee status. Rather, the locus of ultimate and delegated authority in the administration has been stressed to show that American colleges and universities are not, as is often argued (Resp. Br. 35 n.17; NSPE Br. 20; Johns Hopkins Br. 29-30), self-governing communities of scholars. See Board Br. 36-37 & n.30.

II.

The University objects (Resp. Br. 30, 54-58) to our demonstration (Board Br. 45-48) that collective bargaining is compatible with the governance of universities and the economic realities of academic employment, claiming that such an analysis has no relevance to the issue at bar.[9] We do not, of course, quarrel with the proposition that individuals who would otherwise be deemed managerial or supervisory personnel do not become statutory employees merely because they desire to belong to a union or because unionization would be consistent with prevailing practices at the place of employment. However, a showing that inclusion of faculty members within the coverage of the Act would further statutory purposes, and that university faculty members share the economic concerns that prompt working people generally to seek the benefits of collective bargaining, buttresses the preceding demonstration that faculty members satisfy the legal standards traditionally utilized in determining "employee" status (and exemplify the congressional purpose in extending the Act's protection to professional employees). As this Court noted in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (1971), "[t]he term 'employee' 'must be understood with reference to the purpose of the Act and the facts involved in the

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[9] In contrast, amici strenuously contend that the Board's position cannot be sustained because university governance is incompatible with collective bargaining. Johns Hopkins Br. 8-16; NSPE Br. 19-32.

economic relationship'" (quoting *NLRB* v. *Hearst Publications*, 322 U.S. 111, 129 (1944)). Most pertinently the Court added that "[i]n doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning." 404 U.S. at 168. See also *Fibreboard Paper Products Corp.* v. NLRB, 379 U.S. 203, 211-212 (1964).

While university faculty members have many characteristics that distinguish them from industrial "working men," their employment situation is comparable to that of the professional medical personnel, lawyers, accountants, and scientists that Congress intended to embrace within the Act. Moreover, faculty members share most of the economic concerns of ordinary working people—concerns that justify our characterization of them as "rank and file" employees. Faculty members have the same interests as other working people in obtaining pay raises and improvements in the terms and conditions of their employment through collective bargaining. They are concerned with compensation,[10]

[10] In recent years, the economic position of college and university faculty members has substantially eroded. Adjusting for inflation, the average professional salary has declined every year since the 1973-1974 academic year. Between the 1972-1973 and 1978-1979 academic years, the average salary in "real" dollars declined by 13.6%. See W. Hansen, *An Era of Continuing Decline: Annual Report on the Economic Status of the Profession, 1978-79*, 65 Academe: Bulletin of the AAUP 319, 325 (Table 4) (Sept. 1979). This steady decline has been felt across all professional ranks, from instructor to full professor (*id.* at 321, Table 1). The consequences of this large decline in faculty salaries are varied, but commentators have noted that such conditions produce "the likely hardening of attitudes about the need to organize more effectively to promote the economic interests of faculty members. * * * [T]here is likely to be a greater push for collective bargaining" (*id.* at 329). See also H. Bowen, *Academic Compensation: Are Faculty and Staff in American Higher Education Adequately Paid?* 65-67, Table A (Teachers Insurance and Annuity Association 1978), showing a real decline of 7% in salaries and 5% in total compensation between 1972-1973 and 1976-1977.

The faculty at Yeshiva has not fared well economically even relative to the faculties at comparable private universities. For example, the most recent figures from the Hansen survey show that while the average compensation package paid to full professors in comparable institutions is $37,000, the average full professor at Yeshiva receives $30,400; the average salary in comparable institutions is $31,100, but $27,000 at Yeshiva (W. Hansen, *supra*, at 334, 348). And while the average salary of a full professor in schools similar to Yeshiva has increased 6.2% in dollar amount in the last two years, the increase at Yeshiva has been only 2.6% (*id.* at 333, 348).

job security,[11] and the conditions of academic employment.[12] Current conditions in the over-crowded em-

[11] The American Association of University Professors (which represents many faculty bargaining units) has recently noted a trend toward unilateral reduction of faculty appointments to tenured positions. See the report of the Subcommittee of AAUP Committee A on Academic Freedom and Tenure, *On Full-Time Non-Tenure-Track Appointments*, 64 A.A.U.P. Bull. 267-273 (Sept. 1978). And see *Academic Freedom and Tenure: University of Detroit*, 64 A.A.U.P. Bull. 36 (Mar. 1978) (discussing the discharge of 40 professors, 29 tenured, for economic reasons). The assertion of amici (Johns Hopkins Br. 13-15) that collective bargaining poses a potential threat to the tenure system ignores the fact that erosion of that system is a principal motivation for faculty members to seek union representation.

[12] Collective bargaining has assisted faculty members in their efforts to resist curtailment of traditional prerogatives. See, *e.g.*, R. Nielsen & I. Polishook, *Collective Bargaining*

ployment market for college professors, and efforts by university administrators to curtail rising costs, intensify the danger of unemployment or non-promotion for faculty members, and diminish the possibility of obtaining substantial improvements in the conditions of academic employment.[13] Nothing in their responsibilities as educators precludes faculty members from attempting to resolve their concerns about the terms and conditions of employment through collective bargaining.[14]

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and Beyond, The Chronicle of Higher Education 7 (May 21, 1979):

> It is not unusual to find similarities between faculty "handbooks" or "guidelines" formerly promulgated by academic management and college contracts, with the one major difference being the enforceability of the contract that replaced the president's prerogative. In this sense, collective bargaining is not new to the campus. What does occur—when the informal structure fails to work—is that collective bargaining becomes the means whereby the faculty secure what management has said, all along, is theirs.

[13] For an overview of the severe economic pressures currently facing college faculty members, see W. Hansen, *supra*, at 327. See also the brief amicus curiae of the American Association of University Professors 2-6. Curtailment of academic or research programs in response to such pressures can, of course, severely affect the terms of employment—or even the continued existence of employment—of particular faculty members.

[14] The University suggests that assertion of economic concerns by faculty members can foster an "adversary" relationship on campus and thereby threaten the academic environment (Resp. Br. 55). That, however, is a question apart from the issue presented here. Regardless of the scope of the National Labor Relations Act, faculty members are free to assert their collective interests (through, for example, faculty welfare committees or faculty senates) and thereby confront administrative policies that are contrary to their economic welfare. The National Labor Relations Act merely introduces into this process of economic confrontation the requirements of orderly bargaining. See *Ford Motor Co.* v. *NLRB*, No. 77-1806 (May 14, 1979), slip op. 10: " 'The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.' * * * The assumption is that this is preferable to allowing recurring disputes to fester outside the negotiation process until strikes or other forms of economic warfare occur."

While the University disputes the relevance of our contention that the position of faculty members is analogous in many respects to that of other workers, it does not hesitate to argue that the fact that the "industrial analogy is imperfect" proves that Congress did not intend to "treat professors as 'employees' " (Resp. Br. 36-38; see also NSPE Br. 21-22). The industrial analogy concededly is not perfect. However, the University's model of a community of scholars identical with, and pervasively in control of, the academic enterprise is further from the mark. That model cannot be squared with the University's repeated assertion that dangers would "hover in the wings" if faculty members were permitted to assert their interests through the collective bargaining process (Resp. Br. 31, 55-56). On the one hand, the University argues that faculty members are merged with itself, having no separate interests. On the other, the University maintains that it needs to be sheltered from the faculty's assertion of economic

concerns through collective bargaining. If the University and faculty did not have the separate interests of employers and employees, which the Board found in this case, there would be no occasion to protest the bargaining relationship that is recognized when parties negotiate over the terms and conditions of employment.[15]

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[15] Contrary to the assertion in Johns Hopkins Br. 10-11, recognition that faculty members are employees under the Act does not mean that existing faculty bodies (such as faculty senates) violate Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2). Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *." Section 8(a)(2) does not, however, bar all forms of employer assistance to labor organizations. See, *e.g.*, *Sunnen Products, Inc.*, 189 N.L.R.B. 826, 828 (1971); *Ladish Co.*, 180 N.L.R.B. 582, 585 (1970). Thus, in *Duquesne University*, 198 N.L.R.B. 891 (1972), the Board recognized that university assistance to a nonprofessional employee committee in the form of free use of university premises, meetings on university time, and university subsidization of a committee newsletter, did not in itself constitute unlawful assistance where the university "freely makes available its facilities, time, and services to any desirous organization." The Board also noted that even if employer assistance reaches an unlawful level, the employee organization need not be disestablished unless it has been "dominated" by the employer. *Id.* at 893. Moreover, employer domination does not arise merely because employer representatives are included in the organization. See *Hertzka & Knowles* v. *NLRB*, 503 F.2d 625, 626, 630-631 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1975). See also *NLRB* v. *Northeastern University*, No. 78-1222 (1st Cir. June 26, 1979), slip op. 8, rejecting a Section 8(a)(2) challenge to an organization of employees established by a university president, and noting that the courts have appropriately "recogniz[ed] some

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room for management-employee cooperation short of domination * * *." The Act does not prohibit organized collective endeavor by professional employees (apart from and in addition to collective bargaining) in performance of the collective professional aspects of their employment responsibilities. And the Board has never held that faculty organizations infringe Section 8(a)(2) where such bodies have been formed without regard to union organization efforts. The only case in which a faculty senate was found to be in violation of Section 8(a)(2) is *Stephens Institute*, 241 N.L.R.B. No. 71 (1979), where the senate was established by the college administration in response to, and as a weapon against, a union organizing campaign. Slip op. 32-33. See generally Finkin, *The NLRB in Higher Education*, 5 Toledo L. Rev. 608, 647-648 (1974).

For the foregoing reasons and the reasons stated in the Board's principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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